PACIFICORP

IBLA 85-405 Decided December 12, 1986

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, dismissing objections to readjustment of coal lease W-0312918.
Affirmed.

1. Coal Leases and Permits: Leases -- Mineral Leasing Act: Generally

The Board of Land Appeals will not reverse as unreasonable a readjustment of a coal lease to establish a 12-1/2 percent production royalty on the value of coal produced by strip or auger methods, since the lessee may seek further rate relief under 30 U.S.C. § 209 (1982) if needed.

APPEARANCES: John S. Lopatto, III, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Pacificorp has appealed from the January 22, 1985, decision of the Wyoming State Office, Bureau of Land Management (BLM), dismissing its objections to readjustment of coal lease W-0312918. Although appellant's statement of reasons contains a number of arguments, these arguments relate to one single objection: BLM's imposition of the 12-1/2 percent royalty rate specified by 30 U.S.C. § 207 (1982) for coal produced by surface mining methods without taking into consideration the economic impact of this royalty increase on the production and marketing economics of appellant's lease.

[1] This Board has consistently held that when an existing coal lease is readjusted, the terms and conditions of the readjusted lease must be consistent with the statutory and regulatory requirements in effect at the time of readjustment. E.g., Coastal States Energy Co., 70 IBLA 386 (1983), aff'd, Coastal States Energy Co. v. Watt, 629 F. Supp. 9 (D. Utah 1985), appeal docketed, No. 86-1301 (10th Cir. Feb. 24, 1986). The pertinent statutory provision, 30 U.S.C. § 207(a) (1982), provides: "A lease shall require payment of a royalty in such amount as the Secretary shall determine but not less than 12-1/2 percentum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations." Although the statute allows the Secretary to establish a lower rate in the lease for coal mined by underground methods, the 12-1/2 percent royalty is the lowest rate that can be given in a lease for mining coal by surface methods. This statutory provision is implemented

by 43 CFR 3473.3-2 which provides that royalties may be set on an individual case basis but sets a 12-1/2 percent floor, consistent with the requirement of the statute. Subsection (d) of that regulation, however, points out that a lessee may apply for a further reduction of royalty pursuant to 43 CFR Part 3480, which implements 30 U.S.C. § 209 (1982).

We recognize that one district court has reversed the Board's position on this issue. FMC Wyoming Corp. v. Watt, 587 F. Supp. 1545 (D. Wyo.), appeal docketed, No. 84-2175 (10th Cir. filed Aug. 29, 1984). In Ark Land Co., 90 IBLA 43 (1985), the Board set aside and remanded a case involving the readjustment of the royalty of a lease situated in Wyoming, instructing BLM to issue a decision in accordance with the final decision of the matter now before the circuit court. Shortly after the Board issued the Ark Land decision, however, the district court in Utah issued a decision in which it expressly disagreed with the Wyoming court's opinion. Coastal States Energy Co. v. Watt, supra at 21 n.14. The decisions of both district courts are under appeal, so no binding precedent exists. Moreover, BLM petitioned the Board for reconsideration of our disposition of Ark Land Co., citing the Coastal States decision. Reconsideration was granted by order dated February 7, 1986; decision on the merits of this petition remains pending before the Board (IBLA 84-826). Consequently, the Ark Land decision lacks finality.

The pendency of litigation involving coal lease readjustments does not require us to withhold action in this appeal until that litigation is concluded. Consideration of past Departmental practice in this area of concern reveals that several years ago, two circuit courts of appeal considered this Department's interpretation of the statutory provisions governing reinstatement of terminated oil and gas leases. Ram Petroleum, Inc. v. Andrus, 658 F.2d 1349 (9th Cir. 1981); Ramoco, Inc. v. Andrus, 649 F.2d 814 (10th Cir.), cert. denied, 454 U.S. 1032 (1981). The Department did not suspend consideration of reinstatement cases pending the outcome of this litigation. The Index-Digest of the Department of the Interior shows 66 oil and gas lease reinstatement decisions were issued between the initial complaints in these cases and the denial of certiorari in Ramoco. Pacificorp's position in the instant appeal has less apparent merit than the position taken by Ramoco and Ram Petroleum in their suits for judicial review in their reinstatement cases. If we are to follow the Department's practice in the Ramoco situation, therefore, there should not be a suspension of pending administrative appeals while judicial review is incomplete.

Even though appellant's lease is situated in Wyoming where a Federal district court has published a decision adverse to the Department on the issue raised in the appeal, this circumstance does not require us to await the appellate court's decision. Were the appellate court to affirm the agency, our delay would have served no purpose. Even were the appellate court to reverse the agency, we would not be able to state with certainty that its decision would govern the disposition of this appeal. Under 28 U.S.C. § 1391 (1982), the Federal district courts in Wyoming and the District of Columbia have venue over an action arising from this appeal, and these districts lie in different appellate circuits. If one court decides

a case adverse to the agency, the agency cannot determine whether that decision would have any precedential effect in cases pending before the agency until a forum for judicial review of those actions has been selected. This event can only occur after proceedings before the agency have concluded because appellants must exhaust their administrative remedies before seeking judicial review. See 5 U.S.C. § 704 (1982). Furthermore, the Supreme Court has recently held that a Federal agency could not be precluded from relitigating the same issue against a different party. United States v. Mendoza, 464 U.S. 154 (1984). In holding that such preclusion, termed "nonmutual collateral estoppel," may not be invoked against the United States, Justice Rehnquist wrote for a unanimous Court:

> A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. See E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135, n.26 (1977); see also Califano v. Yamasaki, 442 U.S. 682, 702 (1979). Indeed, if nonmutual estoppel were routinely applied against the Government, this Court would have to revise its practice of waiting for a conflict to develop before granting the Government's petitions for certiorari. See this Court's Rule 17.1.
>
> The Solicitor General's policy for determining when to appeal an adverse decision would also require substantial revision. * * * The Court of Appeals faulted the Government in this case for failing to appeal a decision that it now contends is erroneous. 672 F.2d, at 1326-1327. But the Government's litigation conduct in a case is apt to differ from that of private litigant. Unlike a private litigant who generally does not forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal. Brief for United States 30-31. The application of nonmutual estoppel against the Government would force the Solicitor General to abandon those prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review.
>
> In addition to those institutional concerns traditionally considered by the Solicitor General, the panoply of important public issues raised in governmental litigation may quite properly lead successive administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue. While the Executive Branch must of course defer to the Judicial Branch for final resolution of questions of constitutional law, the former nonetheless controls the progress of Government litigation through the federal courts. It would be

> idle to pretend that the conduct of Government litigation in all its myriad features, from the decision to file a complaint in the United States district court to the decision to petition for certiorari to review a judgment of the court of appeals, is a wholly mechanical procedure which involves no policy choices whatever. [Footnote omitted].

Id. at 160-61 (1984). Similarly here, it would be improper for the Department to freeze action upon all pending coal readjustment disputes simply because there is pending litigation which could result in a judicially changed interpretation of the law governing coal lease royalty payments. This in no way impinges upon the power of the courts to say what the law is; it simply recognizes the need, pending resolution of this dispute, to continue the administration of these coal leases in an orderly and regular way.

Although the conflicting Coastal States and FMC decisions are now before the same circuit court of appeals, at least one other case raising similar issues is pending before a district court whose decisions are subject to appeal to a different circuit court. E.g., Consolidation Coal Co. v. Hodel, No. CV 85-361 BLG-JFB (D. Mont., filed Dec. 2, 1985). Furthermore, the Department has issued leases for federally owned coal deposits in at least 12 states, and appeals from decisions involving those leases can arise in any of five different circuit courts of appeals. Congress intended that the statutes and regulations under which these leases are administered grant the same rights and impose the same obligations in Montana as they do in Wyoming or any other state in which the leased deposits are situated. If the agency were to interpret a statutory requirement in one way for a Montana lease and in an opposite way for a Wyoming lease, the agency's action would be arbitrary and capricious by definition. We have already allowed the readjustment of a Montana coal lease in a case which was once consolidated with this appeal. Spring Creek Coal Co., 94 IBLA 333 (1986). It would be arbitrary and capricious if we failed to make similar disposition of the instant appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

James L. Burski
Administrative Judge